ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

JOHN D. DINGELL, MICHIGAN
CHAIRMAN

March 9, 2007

The Honorable Elaine L. Chao
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Chao:

The Committee on Energy and Commerce is deeply distressed that the Department of Labor (DOL) is approving settlements that cause whistleblowers to be blacklisted from employment in their profession or field even though your agency's own regulations bar blacklisting as illegal and against public policy. This flagrant affront to whistleblower protection and good government practices must stop.

This Committee enacted most of the whistleblower laws administered by the DOL to prevent employers from blacklisting or retaliating against those who disclose safety hazards at nuclear facilities, refuse to violate Federal environmental laws or expose corporate accounting fraud. These laws provide "witness protection" and preclude adverse employment actions for those whistleblowers who report violations to managers, notify Federal agencies, testify before Congress, refuse to perform acts made illegal by Federal laws, or seek relief from employer reprisals related to protected activity.

Despite this clear intent, courageous workers are being systematically weeded out of the workforce with the Labor Department's blessing, and, in some cases, effectively banned from applying for employment in their chosen trades. This undermines the purpose of laws designed to protect whistleblowers that raise concerns in good faith. It also undermines respect for the Government in general and your department in particular since you are seen as condoning such egregious conduct – something that harkens back to the darkest days of labor-busting form the early 20th Century and the McCarthyism abuses of the 1950s.

As the Secretary of Labor, you must approve all whistleblower settlements after making a determination that the settlement "is fair, adequate and reasonable" thereby giving the settlement the official imprimatur of the Federal Government.

We are requesting that you immediately suspend the practice of approving whistleblower settlement agreements which contain blacklisting or banishment clauses, as such approvals impermissibly sanction discrimination against individuals engaged in activity protected by Federal whistleblower laws and are contrary to public policy. This letter further requests a briefing from your staff, answers to questions about the legal basis for DOL settlements with blacklisting clauses, and documents necessary to fully review this matter and its impact upon a number of laws that this Committee oversees in the area of nuclear safety and the environment.

This Committee has reviewed a Rulemaking Petition submitted by the Government Accountability Project (GAP) requesting that DOL amend its regulations governing whistleblower claims to prohibit the approval of settlement agreements when they contain (1) permanent or temporary employment ban clauses, and (2) confidentiality clauses.

The GAP Petition reviewed 45 settlement agreements released under a Freedom of Information Act request, from January 1, 2000, to the present, covering environmental and nuclear safety laws. Of these, nearly half of the agreements banned the employee from ever applying for work with the employer, its affiliates or sub-contractors. Six of the agreements banned the employee from ever applying for work with a different employer that is performing work at the same facility as the defendant employer. Many of these settlements were also marked confidential, obscuring these blacklist clauses from public view. Each of these settlement agreements required and received approval by the DOL.

DOL's whistleblower regulations state that "*Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces,* ***blacklists****, discharges, or in any other manner discriminates against any [covered] employee...*"[1]

Given this prohibition on blacklisting, it is inexplicable why DOL would sanction blacklisting clauses in settlements of whistleblower cases. DOL has the power to prohibit blacklisting clauses in settlements as unlawful and contrary to public policy, in the same manner as DOL already prohibits settlements which bar whistleblower from speaking to Congress or regulatory agencies.

These settlements are far different from settlements of litigation involving two private parties because DOL must bless these settlements as being fair, adequate and reasonable before they can be effectuated. For DOL to sanction settlements that deprive whistleblowers of meaningful employment in the future, as the price for engaging in protected activity, completely and utterly frustrates both the letter and intent of whistleblower laws.

Of the 45 cases summarized in the Petition for Rulemaking, 29 were brought under the Energy Reorganization Act (ERA), otherwise known as the Nuclear Whistleblower Protection Act, 42 USC § 5851. The Energy and Commerce Committee amended the ERA on several occasions, particularly in 1992 and in 2005, in order to make clear that these workers represent the front-line for public safety. For instance, in 1992 we said:

---

[1] *See* 29 C.F.R. § 24.2(b)

> "The ability of nuclear industry employees to come forward to either their employers or to regulators with safety concerns without fear of harassment or retaliation is a key component of our system of assuring adequate protection of public health and safety from the inherent risks of nuclear power. Recent accounts of whistleblower harassment at both NRC licensee (e.g., Millstone Nuclear Plant in Connecticut) and DOE facilities (e.g., Hanford, Oak Ridge, Rocky Flats) suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry."[2]

In other cases, the DOL-sanctioned employment ban prohibited future employment at entire work sites, even in areas where the defendant company was not active. This was the case at the Department of Energy's (DOE) 560 square mile Hanford site, where a large number of whistleblower complaints have been brought against Government contractors. Over time, the effect of requiring whistleblowers to sign a banishment clause is to purge the facility of any employee who might have the integrity or audacity to raise health, safety or environmental concerns. In one case involving a couple formerly employed at Hanford, the settlement agreement contained the following clause:

> The Wallaces agree never to seek or accept employment or re-employment with CH2MHILL, or any of its subsidiaries and affiliates in which CH2M HILL has an ownership interest, or to perform work at a CH2M HILL operated site or facility for another employer that contracts for receipt of DOE Funds for specialized services at the Hanford site. The Wallaces agree never to seek or accept employment **at the Hanford Reservation**, including, but not limited to the Hammer training facility [emphasis supplied].[3]

A case involving the Strata Corporation at the DOE's Fernald facility went even further. The clause in that settlement reads as follows:

> Strata G (a Fluor Fernald subcontractor), Ohio
> "No Reinstatement" clause. Gilbert waives any claim for reinstatement of employment and will not seek or apply for re-employment with the Company or employment with any of the Releasees.[4]

This provision effectively bars Mr. Gilbert from ever seeking reemployment from the following companies: Fluor, Jacobs Engineering Group, Inc., Duratek Federal Services, Inc. and Nuclear Fuel Services, Inc. These companies are heavily represented at almost every DOE site in the country--effectively banishing the whistleblower from most DOE facilities nationwide.

In a whistleblower case involving the Indiana Michigan Power Company brought under the Energy Reorganization Act, a confidential settlement agreement was entered into, which includes a banishment clause:

> [Mr.] So agrees that he will not seek employment with the Company or with any contractor or subcontractor of the Company, if such employment would cause So to perform work of any

---

[2] Legislative History – Energy Policy Act of 1992, amending Energy Reorganization Act, 42 U.S.C. § 5851, H.R. No. 101-474(VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 1953, 2296-2297.
[3] *Wallace v. CH2M Hill*, Case No. 2004-SWD-00003, 7/12/05 (Settlement Agreement)
[4] *Gilbert v. Fluor*, Case No.2004-ERA-00012, 8/18/04 (Settlement Agreement)

nature relating to the sights, operations or employees of the Company. [Mr.] So will decline any employment or assignment with any employer which will cause him to perform such work.[5]

The banishment clause extends not only to Indiana Michigan Power Company but also to its parent American Electric Power, NUMANCO and Sun Technical Services, Inc.

In conclusion, whistleblowers are the eyes and ears that can alert the Congress, agencies and the public to safety hazards, environmental misdeeds and corporate malfeasance. Their disclosures have saved lives and returned billions of dollars to the Treasury. It is the policy of our Nation, codified in environmental, energy and accounting statutes, to encourage workers to come forward with disclosures of wrongdoing and to protect those workers when they serve as witnesses or blow the whistle.

Pursuant to Rules X and XI of the Rules of the House of Representatives, the Committee on Energy and Commerce and the Subcommittee on Oversight and Investigations, are conducting an investigation into this matter, and is hereby requesting documents and answers to certain questions. Please supply the requested documents and address the questions below by the close of business on Friday, March 23, 2007:

Document Request:

1. Any and all settlement agreements approved by the Department of Labor between January 1, 2000 and the present which involve the 11 statutes administered by DOL: Clean Air Act, 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610; Energy Reorganization Act, 42 U.S.C. § 5851; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129; Safe Drinking Water Act, 42 U.S.C. § 300j-9; Sarbanes-Oxley Act of 2002, 18 U.S.C. & 1514A; Solid Waste Disposal Act, 42 U.S.C. § 6971; Surface Transportation Assistance Act, 49 U.S.C. § 3110; Toxic Substances Control Act, 15 U.S.C. § 2622; and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.

2. Copies of the complaints (or amended complaints) that were filed with the Department related to the respective settlements provided in Request #1.

3. Any and all internal policy directives or memoranda relating to the review criteria and basis for approving or denying settlement agreements under any of the 11 whistleblower laws administered by the DOL.

Questions:

In addition, please provide the Committee with written answers to the following questions:

1. What is the justification for the DOL policy to approve settlement agreements that contain provisions that bar future employment for whistleblowers?

2. Please provide the justification for the Department's approval of whistleblower

[5] *Dominic H. So v. Indiana Michigan Power Company,* Case No. 2002-ERA-19, 9/11/02 (Settlement Agreement)

settlement agreements that contain confidentiality provisions.

3. Do you believe that provisions which bar future employment are consistent with the purposes of the statutes designed to encourage the reporting of misconduct, or violations of health, safety or environmental protections?

4. Does DOL consider a ban on future employment a form of discrimination? If not, why not?

5. Given that blacklisting of employees is deemed prohibited employer conduct under DOL regulations, why has DOL approved settlement agreements that bar employees from future work? Provide any associated legal analysis that DOL has developed on this issue.

6. When will DOL decide on the Petition for Rulemaking in this matter?

7. Will DOL implement a new policy that bars the approval of settlements with blacklisting or banishment clauses? If so, when will this occur?

If the Department elects to assert a privilege or objection to the production of the foregoing documents, please provide a privilege log fully identifying each document withheld and the legal basis for withholding that document from a Congressional committee of competent jurisdiction.

We also request that a copy of this letter be given to any and all employees who work on whistleblower claims, including those in Occupational Safety and Health Administration, the Office of Administrative Law Judges, the Administrative Review Board, or the Office of Solicitor, and specifically advised on their right to speak with and cooperate with this Committee during this important investigation.

In responding to this request for documents, please be advised that the terms "records" and "relating to" are defined in the attachment to this letter. In addition all records submitted to this Committee must be produced unredacted.

To arrange a time for a briefing, please contact John Sopko, Chief Counsel for Oversight, at (202) 226-2424. Documents and responses should be sent to the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, U.S. House of Representatives, room 316 Ford House Office Building, Washington, D.C. 20515. Your assistance with this request is appreciated.

Sincerely,

John D. Dingell
Chairman

Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Ed Whitfield, Ranking Member
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce

ATTACHMENT

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.

2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.